The Present Development and Status of International Law

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FIRST ANNUAL CONFERENCE
LOUISIANA STATE UNIVERSITY
ON
FOREIGN AFFAIRS
AND
AMERICAN DIPLOMACY

SEVENTH ROUND TABLE

Reading Room of University Library
Saturday Afternoon at Two O’Clock
February the Fifth

THE PRESENT STATUS OF INTERNATIONAL LAW

Leader—AMOS S. HERSHEY, Professor of International Law, University of Indiana.

Chairman—PRESIDENT W. B. BIZZELL of the University of Oklahoma.

Leader of Discussion—A. B. BUTTS, Professor of Government, Mississippi A. and M. College, and Chairman of the Round Table.
THE PRESENT DEVELOPMENT AND STATUS OF INTERNATIONAL LAW

AMOS S. HERSHEY.

There still seems to be a prevalent impression that international law suffered irreparable damage—or, to use a slang phrase, was practically "shot to pieces"—during the World War, though the international jurist is no longer called upon to apologize for himself or his subject, as was then often the case. If any of you share this view, I want to call to your attention the fact that only the so-called laws of war and of neutrality were thus affected (and that merely in part, for the rules respecting the treatment of prisoners and the sick and wounded were fairly well observed). In the more recent treatises on international law the law of war and neutrality occupies about one-third of the space that is given to the general subject. The law of peace either remains intact or is considerably enlarged.

If I were asked to indicate in a single paragraph the most important developments in international law during recent years (the beginnings of these developments antedate the war period), I should say it is the creation of new agencies or of machinery and methods for: (1) the pacific solution of international contraries with the aim of preventing war; and (2) the development of international organization, more particularly of international legislation, for the solution of pressing international problems.

This development has as its ultimate aim not merely the prevention of war but the promotion of happiness or the general welfare of the entire human race through the replacement of the present relative international political anarchy by forms and methods of world government. The balance of this paper is mainly an enlargement upon this theme.

Thus, instead of having suffered irreparable damage during the World War, it is my considered opinion that international law is at present undergoing the period of its greatest growth—a development which, when consummated, will make all previous growth appear crude and rudimentary, somewhat as we look upon much of the jurisprudence of the early Middle Ages with its wergeld, ordeals, and wagers of battle.

The development of which I speak is very modern. It is mainly the result of the industrial revolution which may be said to have begun in England during the latter part of the eighteenth
century, but whose international effects, due to improved means of communication (steam, submarine cables, wireless telegraphy and telephony, etc.) were scarcely visible prior to the third quarter of the nineteenth century.

Beginning with the first International Sanitary Conference, held in Paris in 1851, we had a long succession of official as well as non-official international conferences or congresses (most of them falling within the period 1874-1914 and mounting up into hundreds). They dealt with a great variety of subjects, such as statistics, sugar duties, weights and measures, monetary matters, international postal and telegraphic correspondence, navigation of rivers, the metric system, submarine cables, private international law, protection of industrial property, railroad transportation, commercial law, international copyright, regulation or suppression of the liquor traffic in certain places, customs duties, promotion of the interests of the working classes, abolition of the slave trade, protection of labor in mines and factories, international arbitration, fisheries, repression of epidemic diseases, international telephony, suppression of the "white slave" traffic, international wireless telegraphy, agriculture, etc.

The most important of these were perhaps the Conference on Telegraphic Correspondence which met at Paris in 1865 and formed the Universal Telegraph Union; the Conference of the Universal Postal Union, founded in 1874; of the European Union of Railway Freight Transportation (1890); the Union for the Protection of Industrial Property, i.e., patents, trade-marks, etc., created in 1883; The Hague Union of 1886 for the Protection of Works of Art and Literature; the four Hague Conferences (between 1893 and 1904) on Private International Law; and the five Pan-American Congresses which have been held since 1890.

For the administration and safeguarding of the results achieved by these conferences, a considerable number of international unions (from 40 to 45 in 1915) were formed. The first of these was the International Postal Union in 1874. Many of these unions were endowed with permanent organs of legislation and administration. Their legislative organ is the congress or conference where unanimity is the general rule, but to which there are exceptions. The administrative organs are known as bureaus, offices, or commissions. Article 24 of the Covenant of the League of Nations provides that international bureaus already established under general treaties shall be placed under the direction of the League, if the parties to such treaties consent; and
that "all such international bureaus and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League." Several new bureaus have been created, but apparently little progress has thus far been made in the way of coordinating the activities of the various bureaus under the general direction of the League. In one case at least—that of the International Sanitary Union—the opposition of the United States made a new health organization necessary.

I have thus far spoken of the international conferences which may be said to have created international law for the regulation and promotion of particular international interests like postal and telegraphic correspondence, etc., through treaties or conventions. As above stated, there are about 45 international bureaus or offices for the administration of this law. I now wish to speak of international law-making of a more general character through political congresses and conferences.

The first example was the Congress of Vienna (1815), which defined the relations of ministers, envoys and ambassadors; declared in favor of the abolition of the African slave trade; and agreed upon general principles intended to secure freedom of navigation on great international rivers, at least for co-riparian states.

The next law-making congress of great importance was that of Paris (1856), which declared that privateering was abolished; that the neutral flag covers enemy goods with the exception of contraband (free ships and free goods); that neutral goods, contraband excepted, cannot be confiscated when sailing under the enemy's flag; and that blockade, in order to be binding, must be effective. Other important pre-war law-making treaties were the Geneva conventions of 1864 and of 1906 for the amelioration of the condition of those wounded in the field; the general act of the Congo conference of Berlin of 1885; the general act of the Brussels anti-slavery conference (1890), and the various Hague conventions and declarations (1899 to 1907).

The Treaties of Paris (1919-1920) contain numerous provisions and stipulations of an international law-making character. By far the most important of these are the Covenant of the League, which may be said to furnish the greater part of the world with a constitutional or fundamental law for a new world confederacy; and the international labor organization, under
whose auspices there is being created a new and extensive body of international labor law.

It is often overlooked that, in addition to the Treaties of Versailles, St. Germain, Trianon and Neuilly, there were also negotiated at Paris during 1919-1920 a number of special or supplementary treaties, of which the most important were: the treaties with Poland, Czecho-Slovakia, Rumania, etc., for the protection of racial, religious and linguistic minorities; the international air convention (very important); and the St. Germain conventions for the revision of the Berlin, Congo and Brussels acts of 1885 and 1890, and the convention for the control of traffic in arms and ammunitions over large areas.

But the greatest—at least, the most extensive—development in international legislation dates from 1920. The thirty-odd volumes of the League treaty series containing the text of over a thousand registered treaties (many of them multilateral) are an evidence of the ever-increasing amount of treaty-made laws.

In fact, it might be claimed that the League of Nations and the international labor organizations, though they do not legislate directly, are developing a very effective initiative in international law-making.

In the case of the international labor organization there is an annual conference which prepares and discusses draft conventions and recommendations for the adoption of which a two-thirds majority of the government and non-government representatives (who vote individually) are necessary. The agenda for the conference is prepared by the international labor office as settled by the governing body. "Each of the members (i.e., of the international labor organization) undertakes that it will, within a period of one year at most . . . . and in no case later than 18 months from the closing of the sessions of the conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action." (Article 405 of the Treaty of Versailles.) Approved conventions must, of course, be ratified before they become legally binding on any particular state, and in many cases national legislation is also necessary.

At its first five sessions the international labor conference adopted 16 conventions and 20 recommendations. The convention concerning employment of women during the night and the convention concerning the night work of young persons have each been ratified by 13 states. The convention regarding unemploy-
ment (providing for public employment agencies) have been ratified by no fewer than 17 states. In March, 1924, there had been 104 formal ratifications, 22 authorizations of registration, and 137 recommendations for adoption in the various countries. In addition, some 175 legislative measures had been adopted, introduced or prepared, with a view to applying these conventions or recommendations.

In the case of the League of Nations proper, the procedure governing the exercises of the initiative in international legislation is less definite. The normal process seems to be somewhat as follows: Any power that wishes to do so may lay a proposal before the council or the assembly of the League. In some cases the proposal is first debated in the assembly which embodies its wishes in the form of a resolution, or even, as in the case of the Treaty of Mutual Assistance, prepares a draft convention on the subject through one of its committees.

The more usual procedure would seem to be that the Council of the League takes the initiative and sets the machinery for the preparation of a draft convention in motion, i.e., it calls a conference for this purpose. The Secretariat and various technical commissions of the League, such as the transit, health, and economic commissions, have been of the greatest service in the preparation of the agenda for these conferences and in the work of drafting the conventions. On a number of occasions, the initiative has even been taken by these commissions. Again, the Secretariat has proven itself of great service in the securing of signatures and ratifications. For example, it secured about 40 additional ratifications of The Hague opium convention of 1912.

Among the most important of the many additions to international law made through League initiative are the eight conventions prepared by the two transit conferences held at Barcelona in 1921 and at Geneva in 1923. These deal with such subjects as the freedom of transit, the regime of navigable waterways of international concern, of railways, ports, and the use of water power from international rivers for hydraulic pressure.

Numerous other conferences called by the League of Nations have added considerably to our treaty-made law. For example, in 1921 a conference on the white slave traffic revised the older convention of 1910 and resulted in a new convention signed by 39 states. In 1923, a conference on obscene publications revised the convention of 1910 and brought into existence a new convention signed or adhered to by 45 states. The fourth assembly, in 1923,
approved a protocol on arbitration clauses in commercial contracts which has been signed by 20 states. Preparatory work is now being done with a view of legislating on such matters as double taxation, bills of exchange, the reform of the calendar, international motor licenses, etc.

Of course, much of this legislation is prospective in character and there are often difficulties in the way of securing the desired ratifications, but these can probably be overcome, and there is hardly any limit to the possibilities of future development in the field of international legislation through treaties. This is the true method of codification of international law. The really significant fact in this connection is that we are acquiring new machinery and are learning new methods of international legislation. There is being developed a new process of continuous and systematic international law-making, which, together with the formation of habits and traditions of conferences initiated by the League of Nations, will immensely stimulate and facilitate the development of international juristic relations. The meetings of the council and assembly of the League, as also of their various committees, provide opportunity of frequent and, in some cases, almost continuous conference for the discussion and solution of international problems. Not the last of these advantages is the so-called "atmosphere" of Geneva and the presence there of a staff of experts with an international training and outlook. These, indeed, constitute a sort of international civil service.

So much for the process of international legislation, which I consider the greatest present-day contribution to the development of international law. There remains for consideration the direct prevention of war by the finding of substitutes therefor, i.e., the improvement in the agencies and methods for pacific settlement of international controversies.

As is generally indicated in recent texts or treaties, there are now six methods of pacific settlement, viz: (1) diplomacy or negotiations, (2) good offices, (3) mediation, (4) commissions of inquiry, (5) arbitration, (6) judicial settlement. I shall discuss these in their reverse order, but, owing to lack of time, this discussion must needs be very brief and inadequate.

Real judicial settlement, which is the latest of the methods to be developed in international practice, may be distinguished from arbitration as a means of settlement in which the parties to the controversy submit their disputes to a real permanent international court or to judges who are not elected by them; whereas,
international arbitration has for its object the settlement of differences between states by judges of their own choice. The older Hague Tribunal, or so-called Permanent Court of Arbitration, created by the first Hague conference of 1899, was not a court in the true sense.

Attention may be called to the fact that the draft convention for the Court of Arbitral Justice proposed by the second Hague Conference (1907), which would have constituted a real court, failed of adoption because the conference was unable to agree upon a mode of selection of the judges. But an ingenious suggestion by ex-Secretary Root enabled the committee of jurists, which drew up the statute for the Permanent Court of International Justice, to hit upon a plan for the election of judges by the concurrent vote of the League Assembly and Council. In fact, the plan of election may be said to be an ideal one, inasmuch as the selection is made from a list of candidates nominated by the various national groups of members of the older Hague Court of Arbitration, thus insuring that none but distinguished international jurists will even be considered for election.

Unfortunately, the Court of International Justice was not given compulsory jurisdiction in justiciable issues or cases arising from a conflict of rights as at first proposed, but a purely voluntary jurisdiction. However, Article 36 of the statute of the court provides for what is known as the "optional clause" attached to a separate protocol or treaty.

The optional clause furnishes a means by which any power may declare that it recognizes as compulsory, ipso facto and without any special agreement, as regards any other power accepting the same obligations, the jurisdiction of the Court in all or any of the following categories: (1) interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; and (4) the nature or extent of the reparation to be made in an international obligation. The optional clause had, on December 1, 1924, been signed by 23 states. The ratifications numbered 15.

Though the court was not granted obligatory jurisdiction in the statute or constitution of the court, it should be pointed out that, apart from the optional clause, a very considerable amount and variety of compulsory jurisdiction has been conferred upon it by treaty. For example, the Paris treaties confer on the new court jurisdiction respecting ports, waterways, railways, etc. The
special treaties with Poland, etc., for the protection of minorities, also give the court a certain obligatory jurisdiction. Many other instances might be cited.

During the four years of its existence the Permanent Court of International Justice has more than justified its existence. It has given seven judgments and at least thirteen advisory opinions, which had virtually the effect of judicial decisions. Several of its decisions and opinions have dealt with problems of considerable importance. Its authority and prestige have grown year by year and its impartiality has never been questioned. It is certainly within bounds to say that the work the court has already done gives promise of a great future and that it will become one of the vital factors extending the domain of law and order in international relations.

Turning to arbitration as a mode of settling international disputes, we find ourselves dealing with an old and much-advocated method of solution. Developed to a considerable extent by the Greeks, and even in the Middle Ages, it had practically disappeared from international practice during the seventeenth and eighteen centuries, owing probably to the exaggerated ideas of sovereignty which then prevailed. Reintroduced into modern practice by the Jay Treaty of 1794, it had considerable vogue during the nineteenth and early part of the twentieth centuries, particularly after the settlement through arbitration of the famous Alabama controversy in 1872; and again after the adoption of The Hague convention for the pacific settlement of international disputes (1899), which recognized arbitration as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle "in questions of a legal nature, and especially in the interpretation or application of international conventions."

But though some important controversies were thus settled, and war possibly averted on several occasions, arbitration—numerous as the instances are—was used mainly in the settlement of minor issues, especially in cases of claims of a pecuniary nature. The powers, though declaring in favor of compulsory arbitration in principle, were unable to agree to any specific application of it. Except in the case of a few of the smaller powers, they invariably inserted in arbitration treaties between themselves reservations in respect to "national honor" and "vital interests" which rendered arbitration purely optional.
One of the great advances made in the League system of pacific settlement is that instead of merely recognizing and recommending arbitration, mediation and inquiry, each member of the League has agreed with all other members that any dispute between them likely to lead to a rupture shall be submitted to arbitration, judicial settlement, or inquiry. Each member furthermore has agreed not to resort to war until at least three months after the result of the method chosen is made public (Article 15 of the Covenant of the League). Questions solely within domestic jurisdiction are, to be sure, excepted from the jurisdiction of the League; but, in Article 11, "any war or threat of war" anywhere is declared to be a matter of concern to the whole League, and the League is empowered to "take any action that may be deemed wise and effectual to safeguard the peace of nations."

Since the World War we have had a phenomenal development in arbitration treaty-making. Not only has a special agreement to arbitrate particular matters (the compromissory clause) been inserted in many multilateral as well as bilateral treaties, but outside of the United States and Great Britain, the pre-war exception of national honor and vital interest has almost disappeared. This in itself marks a great advance. Not only has there thus been a tremendous development in the direction of obligatory arbitration, but there has also been a tendency to broaden the scope and meaning of arbitration itself so as to make it include various concilatory methods or processes. Witness the Locarno pact and arbitration treaties (which are now in force) and the rejected Geneva protocol.

In respect to the use of good offices, mediation and inquiry enormous advances have also been made. For the purely voluntary good offices and mediation of one or several powers of the older Hague system, there has been substituted a system of League mediation and collective intervention which has thus far proven very successful in the main. Article 11 declares it to be the "friendly right of each member of the League to bring to the attention of the assembly or of the council any circumstance whatever affecting international relations which threaten to disturb international peace or the good understanding between nations upon which peace depends." In fact, it is under Article 11 that most appeals to the League have been made. Though its importance was hardly realized at the time, this article has in practice proven to be one of the most useful in the Covenant.
best example of its successful and speedy application is that of the Aaland Islands.

Notable progress has been made in the direction of the development of the methods of inquiry as a means of settlement. We owe this innovation to The Hague Conference of 1899, which recommended, as far as circumstances allow, the institution of international commissions of inquiry for the elucidation and investigation of the facts in "disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact." There was one successful application of this method in 1904, when war was probably averted between Great Britain and Russia. This was the famous Dogger Bank or North Sea incident, when the Russian fleet attacked some Hull fishing boats under the impression that they were Japanese torpedo boats. The method of settlement employed was the institution of the North Sea Commission, which combined, however, the functions of an international court with those of a commission of inquiry.

The idea (though not the practice) of international commissions of inquiry was greatly developed in the thirty-odd Bryan treaties of 1913-1914 for the advancement of peace which had as their aim the securing of a year's delay for "cooling off" after diplomatic methods of settling a dispute had failed. Though many of these treaties appear to be still formally in force, they are apparently in a state of "innocuous desuetude."

However, these treaties are not deceased, for their method and spirit survive in Articles 12 and 15 of the Covenant of the League of Nations. As already stated, inquiry is one of the alternative methods (alternative to arbitration and judicial settlement) which members of the League bind themselves to employ in the case of a dispute between them likely to lead to a rupture. In case of submission to this method of settlement, the parties in controversy are bound to wait at least nine months after such submission before resorting to war. The League has on several occasions successfully employed this method of settlement.

There remains one mode of settlement to be considered—the old and customary method of negotiation or ordinary diplomacy. Though too often of a Machiavellian character, clumsy and dilatory in its working, harmful in its results, diplomacy in the sense of negotiation is still at work avoiding friction, smoothing over difficulties, settling claims, and effecting compromises. (The question of secret diplomacy is not here raised, though it may be
remarked in passing that the League practices a much more open and much less Machiavelian diplomacy than was ever conceived of in the chancellories.) Negotiations may be carried on orally, by an exchange of notes, or at a congress or conference.

I wish to call your attention to one recent improvement in diplomatic practice which, if not absolutely new, has undergone a considerable development. It is what I should call diplomacy by personal conference, meaning personal conferences between responsible prime ministers or secretaries of foreign affairs. The reference here is not to great international congresses like those of Vienna, Berlin, or Paris.

The original practitioner of this method was perhaps Lord Castlereagh, who arranged for periodical meetings or congresses (as they were called) of the responsible statesmen of the allied powers in the renewal of the quadruple alliance in 1815. Though a few of such congresses were held—Aix-le-Chapelle, etc.—this practice was discountenanced and soon discontinued by Great Britain herself, notably under Canning.

The practice was revived during the World War when, due to the exigencies of the war, the method of direct and frequent consultation between responsible statesmen or principal ministers almost became a habit. The problems presenting themselves to the allies were too numerous, too varied, and too urgent to be dealt with through the ordinary diplomatic channels.

The first conference of this character appears to have been held on July 6, 1915, when a number of responsible French and British statesmen met in order to coordinate their policies for carrying on the war. This meeting was followed by many others, the most important of which were perhaps the conference at Paris on March 26, 1916, and the Rome conference early in January, 1917. The British and French missions to the United States in 1917 may also be regarded as examples of conference by personal diplomacy.

In his remarkable paper on “Conference by Diplomacy,” published in the Round Table for March, 1921, Sir Maurice Hankey, our main source of information on this subject (he claims that he attended 488 international meetings since 1914, presumably acting in the capacity of secretary at all these meetings), tells us that apart from conferences in Russia and America, there were no less than eleven such conferences during the first ten months of 1917. The final consummation was the creation of the Supreme War Council and the development of other inter-allied machinery,
such as the Allied Naval Council, the Allied Maritime Transport Council, and the Blockade Council.

In fact, these councils may for a reason be said to have constituted a sort of super-state or world government for carrying on the war. The Paris Peace Conference, with its eventual dictatorship of the "Big Four," was the lineal descendant of the Supreme War Council. After the war we have for a few years a series of what have been called continuation conferences. These conferences (about 25 in number) were mostly of an inter-allied character and were mainly devoted to vain attempts to solve the problems of reparation and to secure the effective disarmament of Germany, though other matters were also considered. Among the most important were those of San Remo, London, Spa, Cannes, etc. They were finally discontinued (in 1922-1923) owing to Poincaire's preference for note-writing or disinclination to meet Lloyd George in conference. But conference by personal diplomacy has again been revived in Europe in recent years, as witness the frequent meetings between Briand, Stresseman, and Chamberlain.

Attention has already been called to the opportunities afforded by the League of Nations for the practice of diplomacy by personal conference. For example, at the fifth assembly in 1924, seven delegations, including those of Great Britain and France, were led by the prime ministers. Seventeen others were led by their ministers of foreign affairs. At the thirty-fourth session of the council in June, 1925, there were present such statesmen as Chamberlain, Briand, Hymans, Benes, Ishii, and Skzynski.

There is one more movement to which I wish to refer, and I have done. It is that for the so-called "outlawry of war." It is hardly conceivable that war will ever be completely outlawed, for there must always be reservations in case of a surprise attack or in case the League finds it necessary to use force against a recalcitrant member. And, of course, there is always the possibility of war within the League itself. But great progress in this direction has been and is being made. The Covenant of the League aims at the virtual outlawry of a member (and even of a non-member) which fails to observe certain rules of procedure that are laid down. But there are still too many gaps or loop-holes. The rejected Geneva Protocol defined aggressive war as "an international crime," and sought to outlaw war so far as it can conceivably be outlawed. The aggressor was defined as "every state which resorts to war in violation of the undertakings in the
Covenant or in the present Protocol," i. e., as any state that refuses a pacific mode of settlement. The Locarno treaties are largely a regional application of the Geneva Protocol.

Though not yet fully incorporated into positive international law, I submit that the Geneva definition of the aggressor, though not without difficulty in its application, solves a problem which has confronted us since the days of Grotius. To those waging them, all wars seem to be just, and therefore defensive. To the student and historian it is a question of evidence that is difficult to obtain and is not usually available, if ever, until long after the event. But the principle that the state which refuses to submit its case to pacific settlement is to be regarded as the aggressor is relatively easy to apply.

In practice it is not excessively difficult to determine the actual disturber of the peace. If there are several of these, an armistice may be imposed until the dispute is settled by arbitration or some other mode of pacific settlement. Thus at last a problem which has defied solution for centuries has been, at least theoretically, resolved.

Professor A. B. Butts in his discussion emphasized the fact that if law is to be applied in the realm of international affairs that nations must fall back upon judicial decisions. He urged the extension of the common law to the field of international relations. He stated that we are in the beginning of decisions by international courts that will develop for us the common law of international jurisprudence.

Insistence in universities on learning foreign languages would broaden the interpretation of international law and promote the international mind and understanding, declared Dean R. L. Tullis of the Law School of Louisiana State University. He plead for the learning of the languages of other countries.